

Constitutional Constraints in Politics^{*}

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Constitutions do many things. They organize politics. They found and empower political institutions. They legitimate governments. They give voice to political aspirations. Perhaps most distinctively they bind politics.

It is this effort to bind and constrain politics that defines what we generally mean by “constitutionalism.” The rise of the modern notion of constitutionalism was intertwined with liberalism, the belief that there were limits to the legitimate power of government, and that those limitations should be made effective and real.¹ A constitutional government was a limited government, in which certain political ends and means were off limits. The adjective “constitutional” could be affixed to states that recognized and implemented this principle, regardless of the basic form of the regime. Thus, a “constitutional monarchy” was a monarchy that recognized limits to its power. A “constitutional republic” was a popular government that recognized limits to the uses to which the instruments of the state could be put. Constitutional monarchies were not oxymorons, and constitutional democracies were not tautologies, because it was possible to envision that form of political regime unbound by constitutional constraints.² Politics would still be structured. The organs of government would still be defined and

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¹ See Giovanni Sartori, “Constitutionalism: A Preliminary Discussion,” *American Political Science Review* 56 (1962): 853.

² Guillermo O’Donnell’s “delegative democracies” are an example of nonconstitutional republics, in this sense. O’Donnell, “Delegative Democracy,” *Journal of Democracy* 5 (1994): 55.

instituted. The regime would still make claims to legitimacy. But those who wielded power would not recognize inherent limits to their power. Politically, everything could be on the table.³

The challenge of constitutionalism is to make those constraints effective. How can politics be bound? One tempting answer is to set constitutional mechanisms and constraints outside of politics. Politics can be bound by a neutral, external, constitutional enforcer. Though tempting, I do not believe this is an available option. It is not easy to imagine what might exist “outside of politics” in this way.⁴ It is possible, though difficult, to imagine a constitutional enforcement mechanism wholly insulated from the domestic politics of the polity to be bound. For example, the enforcement mechanism might be lodged in a foreign power.⁵ The English Privy Council could supervise and veto the political acts of colonial institutions.⁶ A conquered nation may be subject to the will of its conqueror and find its local orders countermanded by a foreign overlord. An economically disadvantaged nation might make commitments to foreign economic actors and agree (or not) to have those commitments “enforced” by some outside arbiter.⁷ A politically unstable government might treat with foreign governments to guarantee its

³ Of course in practice any regime might still encounter and recognize contingent limits to its power. It may not have the capacity to achieve certain goals, and it might encounter other powerholders who could not be easily defeated or challenged. As the political realists once emphasized, the sovereign may not be “sovereign.” Harold J. Laski, *The Foundations of Sovereignty* (New York: Harcourt, Brace and Company, 1921). A nonconstitutional regime might well have to make compromises and accommodations, but those are transitory, inessential.

⁴ Importantly, the “what” here, a constitutional enforcer, is politically engaged. I do not mean to make claims beyond what we would normally think of as the political realm. There is certainly life “outside of politics” in the relevant senses, but constitutional enforcers are not in that domain.

⁵ Alternatively, constitution makers might try to create a “foreign” power within the polity. Thus, the Chilean high court established by the constitution of 1925 was functionally self-replicating, sealed off from ordinary mechanisms of influence from outside itself. Elizabeth C. Hilbink, *The Politics of Judicial Apoliticism* (New York: Cambridge University Press, forthcoming).

⁶ See, e.g., Elmer Beecher Russell, *The Review of American Colonial Legislation by the King in Council* (New York: Columbia University Press, 1915); Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge: Harvard University Press, 2004).

⁷ Tamir Mustafa describes a weak version of this; Moustafa, “Law versus the State: The Judicialization of Egyptian Politics,” *Law and Social Inquiry* 28 (2003): 883. North and Weingast describe a somewhat more robust version, which is relevant to a point noted below. Douglass C. North and Barry R. Weingast, “Constitutions and Commitments: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England,” *Journal of Economic History* 49 (1989): 803. Garth takes note of some recent innovations that are in this mode, but note that the power to actually enforce these rulings is limited. Bryant G. Garth, “The Globalization of the Law,” in *Oxford*

own continuation.⁸ This would seem to be a rather unattractive option for effectuating constitutional constraints. It is not only unattractive, however. It is also ineffectual, relative to the goal of creating a constitutional enforcer outside of politics.

There are two aspects of constitutional constraint that would have to be outside of politics, and both create problems for those committed to that effort. Constitutional constraints must be both interpreted and made effective. It is possible to shift the kind of politics to which these aspects of constitutionalism are subject, but it is not possible to take them entirely out of politics. We might worry that the constitutional enforcer would know the constitutional requirements but would be infected by politics such that he would stay his hand and neglect to enforce those requirements. There is an element of this in the Hamiltonian claim that the judiciary is the “least dangerous” branch.⁹ With neither force nor will, he suggested, how much trouble can the courts really cause? They can be bullied into passivity in the face of constitutional violations. A constitutional enforcer “outside of politics” would be one who was unafraid to impose constitutional constraints, political pressure to the contrary notwithstanding. We might worry that the constitutional enforcer would not “know” the constitutional requirements. That is, the constitutional enforcer would not be a neutral enforcer of the constitution but would instead be infected by politics such that politics would shape his understanding of the constitutional requirements. This is where it becomes particularly tricky to

Handbook of Law and Politics, eds. Keith E. Whittington, R. Daniel Keleman, and Gregory Caldeira (New York: Oxford University Press, forthcoming). More effective, though historically less consensual, is the reality of “gunboat diplomacy” aimed at securing Western property interests in less developed countries. Niall Ferguson, *Empire* (New York: Basic Books, 2004).

⁸ See, e.g., Andrew Moravcsik, “The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe,” *International Organization* 54 (2000): 217. The Republican Guarantee Clause in the U.S. Constitution is in this vein, though perhaps motivated as much by the desire of the other confederating partners to prevent a nonrepublican government from gaining a toehold within the boundaries of the United States as by the desire of the current state governments to prevent their own political demise.

⁹ Alexander Hamilton, “No. 78,” in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: Mentor, 1969), 465. See also Alexander M. Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merrill, 1962).

see our way to a nonpolitical constitutionalism. The military conqueror, the imperial power, or the gunboat diplomat may well be willing and able to impose his will on a polity without regard to local political pressures, but that does not mean that what is being enforced is true constitutional constraint, neutrally understood. The imperial power may be blissfully ignorant of the political forces at play within the colony, but the decisions of the imperial power will themselves be driven by considerations of imperial politics. The relevant politics has changed, but politics remains.

What does this mean for constitutionalism? Generally, it means that constitutionalism has to be understood in a political context. We cannot expect constitutionalism to operate outside of politics. It has to find a way to make itself felt within and through politics. We might distinguish three different types of constitutional constraints, for there may be different implications for each. First, we might consider specific constitutional rules or intertemporal constitutional constraints. I want to set this aside for current purposes, only to note here that the fact of politics puts particular pressure on these types of rules or constraints. There will be a constant temptation to reinterpret the constitutional rules laid down by the original constitutional drafters so that they cohere with the political ideals, preferences and circumstances of the moment. This is Robert Bork's "political seduction of the law," and there is relatively little that a constitutional lawmaker can do to counter that siren's call.¹⁰ The constitutional commitments of the past will be faithfully interpreted and enforced only to the extent that they remain the commitments of the present.¹¹ The preservation of those constraints is a political task of the

¹⁰ Robert H. Bork, *The Tempting of America* (New York: Free Press, 1990).

¹¹ This can be, and probably should be, complicated a bit. The relevant present commitment may be a procedural rather than a substantive one. We may remain committed to the belief that the substantive commitments embedded in the originalist Constitution must be preserved until changed by a subsequent "solemn and authoritative act" even if we do not remain especially committed to the particular substantive content of the existing Constitution. See Keith E. Whittington, *Constitutional Interpretation* (Lawrence: University Press of Kansas, 1999). Even this

present. The political support for a jurisprudence of originalism, or specific constitutional preservation, must be constructed in the present.

I also want to set aside for present purposes a second type of constitutional constraint. Here I have in mind what I have called the second face of constitutional power, and what Sandy Levinson has recently referred to as “hard-wired” features of the Constitution.¹² These are primarily procedural features of the Constitution rather than specified substantive commitments. The procedures and structures have consequences. They significantly shape and constrain politics. They advantage some interests and disadvantage others. They make some outcomes more likely and others less likely. They are probabilistic constraints. They introduce biases into the political system, but they generally do not determine political outcomes. They do not directly take political possibilities out of play, but they insure that the playing field is not level. This form of constitutional constraint comes closest to being outside of politics precisely because it structures politics. Whether by establishing coordinating conventions or setting “power against power,” constitutionalism in its second face musters politics to its own ends.¹³ To be sure, these elements of the constitutional regime can be politicized and altered, and their significance for politics is not at all fixed, but they are largely self-enforcing and thus avoid many of the problems outlined above. The apportionment of the Senate does not require an external enforcement mechanism in the same way that the Free Speech Clause does.

I want to focus here on a third type of constitutional constraint. These might be regarded as soft constraints, in that they attempt to bind politics to constitutional values but those values

commitment is likely to be hard to sustain if the underlying substance of the Constitution cannot be readily altered by the necessary solemn and deliberate act.

¹² Keith E. Whittington, “Constitutional Theory and the Faces of Power,” in *The Judiciary in American Democracy*, eds. Kenneth D. Ward and Cecilia R. Castillo (Albany: SUNY Press, 2005); Sanford Levinson, *Our Undemocratic Constitution* (New York: Oxford University Press, 2006).

¹³ On constitutions as coordinating conventions, see Russell Hardin, *Liberalism, Constitutionalism, and Democracy* (New York: Oxford University Press, 1999), 82-140. For an elaboration of the pluralistic distribution of power view of constitutions, see Scott Gordon, *Controlling the State* (Cambridge: Harvard University Press, 1999).

are not defined at a very high level of specificity. They seek to limit government, but they do not seek to limit government by any specific set of constitutional rules. Constitutionalism in this mode hopes to achieve a principled politics, a politics that is bound to provide reasoned justifications for its actions. Constitutionalism is something we do, not something to which we submit. It is a performance, not an outcome.¹⁴

We can start by considering what the threats to this form of constitutionalism might be. Why might politics fail to be bound by soft constraints of constitutionalism? We might consider four distinct threats, reasons why politics might not be informed by the notion of constitutional limitations. 1) Constitutional constraints might be resisted. 2) Constitutional constraints might be forgotten. 3) Constitutional constraints might be ignored. 4) Constitutional constraints might be contested. In each case, the solution to this problem is within politics. Constitutional constraints might fail because of politics, but they also must be maintained through politics.

Constitutional Resistance

The first threat is the most severe. Constitutional constraints may fail to bind politics simply because political actors resist constitutionalism itself. They lose faith in the constitutional project and are no longer committed to the idea of constitutional constraints. I have elsewhere called this situation one of constitutional crisis.¹⁵ The point of crisis comes when political actors no longer seek to maintain the constitutional faith. This is not the result of constitutional

¹⁴ Variations on this theme can be found in Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985); John Finn, *Constitutions in Crisis* (New York: Oxford University Press, 1991); Stephen Macedo, *Liberal Virtues* (New York: Oxford University Press, 1991); Dennis Goldford, *The American Constitutional and the Debate over Originalism* (New York: Cambridge University Press, 2005); Howard Schweber, *Constitutional Foundations* (New York: Cambridge University Press, forthcoming).

¹⁵ Keith E. Whittington, "Yet Another Constitutional Crisis?" *William and Mary Law Journal* 43 (2002): 2093.

disagreement or interpretive error. This situation is more radical than that. In a moment of constitutional crisis, political actors *know* that they are acting against constitutional constraints and they *do not care*. They accept the existence of constitutional constraints but they do not accept those recognized constraints as binding, not on them, not now.

The constitutional crisis may be either local or global. The crisis may be localized if political actors only refuse to accept some, but not all, constitutional constraints. They may continue to recognize the possibility of constitutional constraint and remain committed to the idea of a limited government. They may well accept other constitutional constraints that are binding in other circumstances. But at the same time they reject some constitutional constraints, regarding those as no longer binding. They effectively seek to write a set of constraints out of the constitution but by no constitutionally recognizable manner. The crisis may be global if political actors cease to recognize any of the existing constitutional constraints. The crisis may only be transitory. Political actors may shed the old constitution only to don a new one. The crisis may be permanent, a crisis of constitutionalism itself. Political actors may throw off the very idea of constitutional government and embrace some form of government unmodified by constitutionalism and its limitations.

There is no solution within constitutionalism itself to the problem of constitutional resistance. Constitutionalism only binds the willing. Constitutional safeguards can be designed so as to make such moments of constitutional crisis, of constitutional resistance, transparent. Political actors can be forced to make their choice of constitutional resistance apparent. This perhaps creates the best chance that a political opposition may mobilize in defense of the existing constitutional standards and call the constitutional resisters to account politically. The survival of constitutionalism then depends on the extent of the support for it in the broader polity, on

whether a movement on behalf of constitutionalism can in fact be mobilized.¹⁶ What constitutional courts do best is to publicize constitutional transgressions. The efficacy of judicial review as a constitutional check depends on the political acceptance of the judiciary as an adequate arbiter of constitutional violations and on the continued political vitality of constitutional commitments.¹⁷ As Judge Learned Hand once observed, “Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.”¹⁸ *In extremis*, constitutionalism cannot be self-sustaining. It ultimately depends on a favorable political context.

Constitutional Forgetfulness

The second threat is that constitutional constraints might be “forgotten.” In such cases, constitutional constraints are disregarded but there is no active intent to disregard them. Political actors have not chosen to reject constitutionalism. Indeed, they remain committed to the principles of constitutionalism and to the goal of adhering to constitutional constraints. Political actors have the will to be constitutionally faithful, but they lack the judgment. The difficulty is one of constitutional implementation.

This is not a trivial problem. We often imagine the threats to constitutionalism being self-evident and high-profile. Our constitutional memory is shaped by our most visible constitutional conflicts and resolutions. Constitutional teaching and discussion emphasizes

¹⁶ Note that this does not require a “political culture” committed to “constitutionalism” in the abstract. It is sufficient if there are political interests that are capable of being mobilized and that view the current constitutional commitments as politically valuable.

¹⁷ This would be in keeping with Barry Weingast’s approach to conceptualizing constitutions as coordination devices. Barry R. Weingast, “The Political Foundations of Democracy and the Rule of Law,” *American Political Science Review* 91 (1997): 245.

¹⁸ Learned Hand, *The Spirit of Liberty*, 3rd ed. (Chicago: University of Chicago Press, 1960), 190.

something like a highlight reel of constitutional practice. The “constitutional canon” (and anti-canon) is composed of the most celebrated (or infamous) cases of constitutional interpretation and application.¹⁹ The mundane, day-to-day work of maintaining a constitutional government is largely ignored or known only to the practitioners themselves. The constitutional implications of a law restricting access to abortions in 2006 or of a law limiting the number of hours an employee can work in 1930 are obvious. The constitutional implications of a statutory provision requiring local sheriffs to provide background checks on those seeking to purchase a firearm or imposing a federal tax on marine insurance, however, are not so obvious.²⁰ Preserving constitutional constraints in the latter cases is a rather different problem than preserving them in the former cases, and this difference requires some recognition.

We might imagine two sources of constitutional “forgetting.” One source might be the complexity of constitutional requirements, which leads to an inadequate understanding of when constitutional constraints are implicated. Another source might be the complexity of governance, which may result in applicable constitutional constraints being overlooked in the routine press of government business. The first results from a lack of constitutional expertise. The second results from sheer oversight.

In both cases, politics slips from its constitutional binds because of particular and concrete features of the political context, and in both cases adhering to constitutional constraints requires political innovation and adjustment. There are a variety of institutional responses that can be made to minimize the problem of forgotten constitutional constraints. Each source of constitutional forgetting – lack of expertise and oversight – points toward distinct, but

¹⁹ Jack M. Balkin and Sanford Levinson, “The Canons of Constitutional Law,” *Harvard Law Review* 111 (1998): 963; Richard A. Primus, “Canon, Anti-Canon, and Judicial Dissent,” *Duke Law Journal* 48 (1998): 243.

²⁰ On the lack of legislative awareness of potential constitutional issues, see also J. Mitchell Pickerill, *Constitutional Deliberation in Congress* (Durham: Duke University Press, 2004).

overlapping, responses. The complexity of constitutional requirements suggests the need to mobilize expertise to better identify applicable constitutional constraints. The complexity of governance suggests the need either to raise the salience of constitutional constraints so that they are not easily overlooked or to foster specialization in constitutional concerns so that that which is overlooked by political generalists is nonetheless noticed and addressed.

The most obvious institutional strategy for addressing these difficulties is judicial review. As Alexander Hamilton noted, it may be expected that “long and laborious study” is necessary to gain “competent knowledge” of the law, and judges may be distinguished from other government officials in their possession of the requisite skill.²¹ Likewise, judges see the implementation of government policies from a different perspective, perhaps making it easier to recognize constitutional violations.²² Whether or not they are limited to that specialized jurisdiction, courts that exercise the power of constitutional review are effectively specialists capable of focusing attention on the constitutional implications of government policy.

Two things are worth noting about this rationale for judicial review. First, it suggests only what Jeremy Waldron has called “weak judicial review.”²³ Weak judicial review authorizes courts only to flag policies as being in violation of constitutional constraints, but it does not authorize them to refuse to implement those policies. Courts, operating in this mode, may scrutinize and publicize, but may not invalidate. There is no need for judges to wield a veto power in order to introduce constitutional expertise into politics or to give attention to constitutionally flawed policies that might otherwise escape notice. Second, it suggests the limitations of James Bradley Thayer’s call for judicial deference. In part out of a concern that

²¹ Hamilton, “No. 78.”

²² James R. Rogers, “Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction,” *American Journal of Political Science* 45 (2001): 84.

²³ Jeremy Waldron, “The Core of the Case Against Judicial Review,” *Yale Law Journal* 115 (2006): 1355-1356.

the active use of the power of judicial review would sap the legislative will to exercise constitutional responsibility, Thayer called for judges to defer to the policies adopted by legislatures with the hope that the latter could be induced to behave more responsibly.²⁴ Politics may still be expected to slip its constitutional bonds if legislatures lack the expertise or leisure to identify constitutional problems, even if they possess the will to behave responsibly.

There are additional strategies for attempting to realize a Thayerian politics. Judicial review relies on a “fire alarm” model, using the complaints of damaged parties to trigger scrutiny of a government policy. The ability to pull that fire alarm may not be equally distributed, however, skewing how this mechanism may be used to maintain constitutional constraints.²⁵ The multiplication and growth of organized groups with specialized knowledge of constitutional law can both make it more likely that such fire-alarm mechanisms will be triggered and increase the political salience of constitutional problems, reducing the likelihood that constitutional constraints will be overlooked. A political system may also set in motion “police patrols” to monitor for constitutional violations.²⁶ Specialized constitutional expertise and routine monitoring of proposed legislation for constitutional difficulties might be accomplished within the legislative process.²⁷

Constitutional Neglect

²⁴ James Bradley Thayer, “The Origin and Scope of the American Doctrine of Constitutional Law,” *Yale Law Journal* 3 (1894): 108. Thayer separately argued that judges should respect legislative determinations given reasonable disagreement about the true meaning of the Constitution.

²⁵ See, e.g., Marc Galanter, “Why the ‘Haves’ Come Out Ahead: Speculations on Legal Change,” *Law and Society Review* 9 (1974): 95; Charles R. Epp, *The Rights Revolution* (Chicago: University of Chicago Press, 1998).

²⁶ On these two models of oversight, see Mathew D. McCubbins and Thomas Schwartz, “Congressional Oversight Overlooked: Police Patrols versus Fire Alarms,” *American Journal of Political Science* 28 (1984): 165.

²⁷ Examples can be found in Neal Devins and Keith E. Whittington, eds., *Congress and the Constitution* (Durham: Duke University Press, 2005).

A third threat to constitutionalism is the possibility that constitutional constraints might be ignored or neglected. I mean to distinguish the problem of constitutional neglect from both the problem of constitutional resistance and the problem of constitutional forgetfulness. Constitutional resistance involved the active and principled rejection of constitutional constraints, while constitutional forgetfulness involved the literal ignorance of relevant constitutional constraints. Constitutional neglect, by contrast, involves a failure to comply with constitutional constraints in circumstances in which political actors are both aware of the constraints and still in principle committed to them. Constitutional neglect occurs when constitutionalism is valued but it is not regarded by political actors as the highest priority. This situation is consistent with at least one common image of normal politics, one in which politics is unprincipled and short-sighted, buffeted by “pressure groups” and governed by bargaining, compromise, and expediency.²⁸ Political actors have the desire to be constitutionally faithful, but they lack the will. They are too readily seduced into straying from the straight constitutional path when it serves their immediate electoral or policy needs.

One option when confronted with this problem is to exhort political actors to behave themselves better. This is, of course, a reasonable and worthy course of action. Whether it is also efficacious is less certain. It seems unlikely. Political actors are likely to care about constitutional commitments when they have incentives to do so. When voters have an interest in a given constitutional value, for example, politicians are unlikely to trench upon it. When a given constitutional commitment promises instrumental benefits to politicians themselves, or an important subset of them, then it might well be protected against political threats. Political actors may well place an especially high value on some particular constitutional principles. That they

²⁸ See, e.g., Bickel, 58; Harry H. Wellington, “Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication,” *Yale Law Journal* 83 (1973): 246; Ronald M. Dworkin, *Freedom’s Law* (Cambridge: Harvard University Press, 1996), 344-345.

may act on those preferences when there are few or no political costs to be paid is notable, but relatively unimportant. Senator Robert Byrd is well known for his refined sensibilities regarding the constitutional responsibilities and prerogatives of the U.S. Senate, for example, but it is not obvious that his acting on those principles carries any political costs. Of more immediate significance is how politicians behave when there are political costs to upholding constitutional principles. As the political price of constitutionalism rises, politicians will, on the margin, sacrifice constitutional principles for other political goods. When there is a choice between adhering to constitutional constraints and securing reelection, politicians will frequently choose the latter over the former. Exhortation, or more broadly constitutional education, may affect this calculus if it is aimed at either altering the utility function of the politicians themselves (raising the political price that politicians are willing to pay before sacrificing a given constitutional value) or altering the political environment within which politicians operate (by, for example, altering the utility function of voters so that they will demand more constitutional behavior and less unconstitutional behavior from politicians).²⁹

Institutional design may be a more promising general strategy to curbing the threat from constitutional neglect. Thayer and, to a lesser degree, Mark Tushnet have suggested that the best approach is to heighten the political responsibility of legislators for getting the Constitution right.³⁰ If legislators knew that they were operating without a backstop that could catch their constitutional errors, then, the argument goes, they would have more incentive to act responsibly. By raising the cost of constitutional error, this would alter the political calculation that leads to

²⁹ James Madison felt the need to take this path when he thought the Marshall Court had taken the legal restraints off Congress in *McCulloch v. Maryland*. The task for the Jeffersonians going forward was to teach legislators and voters to voluntarily “abstain from the exercise of Powers claimed for them by the Court. . . . And should Congress not be convinced, their Constituents, if so, can certainly under the forms of the Constitution effectuate a compliance with their deliberate judgment and settled determination.” James Madison, “To Spencer Roane, May 6, 1821” in *The Writings of James Madison*, ed. Gaillard Hunt, vol. 9 (New York: G.P. Putnam’s Sons, 1910), 59.

³⁰ See Mark V. Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 2000).

constitutional neglect. It certainly seems likely that legislators will behave more irresponsibly and neglect constitutional values more if they know that those errors will be corrected elsewhere in the political system than if they know that their own actions will be determinative. The question is how great this effect actually is in practice and how much constitutional errors might be reduced if legislators were directly responsible for them. I am skeptical that removing the backstop would induce politicians to behave as constitutionally as we might like. It might well improve their behavior, but it is unlikely to improve their behavior enough.

Institutional designs to respond to this problem might instead be aimed at insulating pivotal political decisionmakers from the political pressures that might lead them astray. There are a variety of devices that might have this effect. The Madisonian solution embedded in the U.S. Constitution, for example, sought to insulate legislators from popular pressures to transgress constitutional limits by expanding their electoral constituencies and extending their terms between elections, “republican remed[ies] for the diseases most incident to republican government.”³¹ More transitory and ad hoc are the strategies of political cover that legislative leaders devise for their legislative followers. Thus, constitutionally problematic proposals may also be quietly killed in committee or reconciliation conference, or they may be countermanded by other statutory provisions that are included as part of a legislative package.³² Senior and electorally safe legislators may cast the decisive votes against popular but constitutionally dubious policies, leaving less electorally secure legislators free to vote for such measures.³³ Presidents may be expected to veto constitutionally troubled bills or gut them through

³¹ Madison, “No. 10.” Somewhat differently, Madison and his fellow Federalists also sought to expand the scope of conflict by nationalizing some political issues in the hope that constitutionally problematic constituency pressures would be more likely to be countered within that larger political arena.

³² Such strategies are discussed in R. Douglas Arnold, *The Logic of Congressional Action* (New Haven: Yale University Press, 1992).

³³ This was the Democratic strategy with the flag burning constitutional amendment. See Keith E. Whittington, *Political Foundations of Judicial Supremacy* (Princeton: Princeton University Press, 2007).

administrative action and implementation, giving electorally pressured legislators a free pass to vote for them.³⁴

The most obvious institutional device of this sort is the power of constitutional review exercised by politically insulated judges. Again, Hamilton recognized this possibility, observing that the “independence of judges” would be particularly beneficial in “guard[ing] the Constitution” from the “ill humors, which . . . sometimes disseminate among the people themselves” and “speedily give place to better information, and more deliberate reflection.” Judicial review would be used to counter “momentary inclination[s].”³⁵ So long as judges are more insulated from those inclinations than are legislators, they may be less likely to succumb to temptation and help insure that constitutional constraints remain binding.³⁶

Some points are worth highlighting about judicial review in this context. First, note that the weak form of judicial review is unlikely to be adequate for addressing the problem of constitutional neglect. Simply flagging a policy as transgressing constitutional constraints is unlikely to be of much help if the political problem is one in which politicians are already aware of the constitutional difficulty but the political price for adhering to constitutional values at the moment is seen as too high. In order to address the problem of constitutional neglect, judges will need to be armed with a veto power. Second, even though judges may be exercising a veto in such cases, they will not necessarily be acting contrary to the preferences of political majorities and political leaders. Voting against the constitutionally problematic policy may be too high of a

³⁴ The veto was frequently used by Jacksonian presidents. Discretion in implementing statutes has been more common among later presidents. See Whittington, *Political Foundations*.

³⁵ Hamilton, “No. 78.”

³⁶ State judiciaries are less insulated from politics than is the federal judiciary, but even there state judges are far more insulated from electoral pressure than are legislators. It should be noted that the focus here is on electorally driven pressures placed on constitutional constraints, but it is possible for “momentary inclination[s]” to capture the minds of government officials as well as voters. In such cases, the sociological and institutional insulation of judges (they aren’t the ones trying to fight the war) may be of greater relevance than their electoral insulation, but sufficient insulation may be more difficult to achieve.

price for the elected legislator to pay, but that does not mean that the legislator would not welcome the intervention of others to block the policy and absorb the political blame. Judicial review in this context may well be seen as “friendly,” even by those who voted in favor of the policy being invalidated.³⁷ Third, note that this form of judicial review does not depend on a Bickelian forward-looking judiciary. In resisting the “momentary inclination” of the legislator, the judges need not attempt to guess what will “gain general assent” “in a rather immediate foreseeable future.”³⁸ Judges seeking to overcome constitutional neglect need not attempt to lead public opinion. They need only enforce standing constitutional principles that politicians neglect to apply themselves. Fourth, constitutionalism is maintained in such cases by manipulating politics not by standing outside of politics. The support for constitutional values in instances of constitutional neglect continues to come from within the political system. Political actors remain committed to the constitutional values that politically insulated judges are asked to apply; they simply do not wish to take the responsibility of applying those values themselves. It is the fact that those values continue to command political support that makes it possible for judges to intervene successfully. Political actors defer to the courts in such situations because the courts speak on behalf of principles that are commonly shared. These judges speak on behalf of principles that are neglected, not resisted, and thus do not invite calamitous resistance themselves.

Constitutional Contestation

³⁷ See also, Keith E. Whittington, “‘Interpose Your Friendly Hand:’ Political Supports for the Exercise of Judicial Review by the United States Supreme Court,” *American Political Science Review* 99 (2005): 583.

³⁸ Bickel, 239.

A fourth threat to constitutionalism is that constitutional constraints might be contested. Constitutional constraints must not only be effectively enforced; they must be understood. The first three threats to constitutionalism considered here all bracket the question of constitutional disagreement. It could be assumed, for those purposes, that constitutional requirements are consensual, if not necessarily “clear.” Constitutional meaning may be obscure, technical or hard to understand. It may be rejected or neglected. These difficulties primarily raise problems of enforcement and application. Accomplishing the feat of binding politics with constitutional constraints is, relative to those problems, a matter of marshaling political resources to insure that constitutional constraints are more likely than not to be recognized and maintained.

The threat of constitutional contestation recognizes that there is not always a consensus on desired constitutional values. The possibility that the fundamental principles of the American constitutional regime may be subject to political disagreement has been recognized at various times over the course of American history, though the general tendency has been to minimize the importance of those disagreements. This is another element of Thayer’s turn-of-the-century analysis of the proper scope of constitutional law, and perhaps the more enduring source of his influence within constitutional theory. The problem confronting judges by the end of the nineteenth century, amidst the rise of populist and progressive constitutional discourse, was that they were reviewing laws that did not merely reflect legislators neglecting or forgetting constitutional requirements. The problematic legislation was not the product of merely transitory “ill humors.” They were the product of serious and sustained political movements, whose policy goals ran contrary to traditional constitutional understandings. At the same time, they did not (or at least, did not generally) frankly admit that some inherited constitutional commitments were to be rejected and regarded as no longer binding. Instead, they marshaled new arguments that

reinterpreted inherited commitments in new ways. Judges were confronted with persistent reasonable disagreement about constitutional meaning. Thayer urged judges to defer in the face of those disagreements. Others urged judges to hold the line. What matters for the moment is that Thayer and his generation ushered in the era of legal realism, and placed the problem of interpretation, and not just the problem of enforcement, at the heart of the constitutional enterprise.

The meaning of a constitution cannot be taken for granted. It must be won, and it must be won within politics. Constitutional meaning has routinely been politically contested. Political movements have organized around divergent visions of the Constitution. Political parties have embraced controversial constitutional claims. Criticisms of judicial efforts to interpret the Constitution are regular features of American politics. Political actors do not simply leave the Constitution in the hands of the courts. They construct constitutional meaning on their own for their own purposes.³⁹ They sometimes respond to and displace the judicial authority to give meaning to the Constitution.⁴⁰ There are periods of relative constitutional consensus and stability, in which constitutional interpretation is characterized more by agreement on basic principles than disagreement. Likewise, the meaning of, often extensive, parts of the Constitution are uncontested and accepted as givens. Nonetheless, over time important components of the constitutional system become the subject of disagreement and political resources are marshaled on behalf of competing visions of the constitutional future.

Constitutional contestation ultimately leads to efforts to entrench favored constitutional understandings. The existence of disagreement puts a premium on elevating a preferred constitutional commitment above the fray. Jeremy Waldron has argued that the circumstance of

³⁹ See Keith E. Whittington, *Constitutional Construction* (Cambridge: Harvard University Press, 1999).

⁴⁰ See Whittington, *Political Foundations*.

disagreement suggests that politics should be open to that disagreement and that disputes should be resolved in a transparent way through majoritarian mechanisms.⁴¹ In practice, however, political majorities seek to make the most of their victories, and the existence of mobilized opponents provide further incentive to insure that the polity remains committed to and constrained by the constitutional values of the majority. Once constitutional politics has been reconstructed around the vision of one set of partisans, judges are unlikely to view alternatives as within the domain of “reasonable” constitutional interpretations that should receive judicial deference. Instead, judges, persuaded by and committed to the constitutional sensibilities of their political sponsors and allies, will exercise the responsibilities of their office so as to correct constitutional error and maintain constitutional fidelity as they see it. The judicial veto is one of the spoils of political war, and once captured it is likely to be actively used. In this mode, judicial invalidations are guided by a contested but politically dominant constitutional vision, and the value of judicial review lies in part in its utility in enforcing constitutional requirements against those who would subvert those requirements, not for the sake of expediency but out of “misguided” principle. To be sustainable over time, however, supporters of this constitutional vision must remain politically powerful, capable of controlling the selection of judges, guiding public opinion, and protecting the independence of the judiciary. The contestation over constitutional principles creates the incentive for political majorities to entrench their own preferences and opportunities for judges to act on those sensibilities to invalidate constitutionally deviant policies, but the strength of those majorities determines how long and successfully those values will remain dominant.

Constitutionalism seeks to bind politics to a set of constraints. There is no perspective external to politics from which to define those constraints, however, and there are no

⁴¹ Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 1999).

mechanisms outside of politics with which to enforce them. Both the interpretation of constitutional commitments and their maintenance over time occur within politics. Attending to the threats that face constitutionalism, the various ways in which constitutionalism might fail to bind politics, gives clues to the political strategies that might be adopted in order to preserve constitutional commitments. Doing so also clarifies various rationales for turning to judicial review and the different forms of and sources of political support for judicial review. Interestingly, these rationales range from the relatively innocuous (rectifying constitutional forgetfulness) to the more hard edged (enforcing contested constitutional understandings). They also point toward the ways in which judicial review offers a response to political dilemmas and is situated within politics, and the limitations of and alternatives to judicial review as a mechanism of constitutional maintenance.